

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE:

B-210435.2

DATE: February 14, 1985**MATTER OF:**

Julie Research Laboratories, Inc.

DIGEST:

The Army properly may specify sole sources for items being purchased to implement a foreign military sale (FMS), where the FMS customer requests the particular sources.

Julie Research Laboratories, Inc. (JRL) protests that the Department of the Army's solicitation No. DAAH01-84-R-0360 unduly restricts competition. The solicitation implements a foreign military sale (FMS)--under the Arms Export Control Act, as amended, 22 U.S.C. § 2751-2796c (1982)--to Egypt of a "Secondary Reference Calibration Set" and spare parts, and requires certain brand name components specifically requested by Egypt. A secondary reference calibration set includes equipment required to calibrate intricate weapons and communications systems. JRL, a calibration equipment manufacturer, protests that the brand name designations violate the fundamental requirement for maximum practicable competition in federal procurements. JRL points out that this solicitation involves the same basic requirement as did a previous solicitation (No. DAAH01-83-B-A032) that JRL had protested was unduly restrictive, and which the Army canceled after finding some merit to JRL's protest.

We deny the protest.

Egypt's original request for a calibration set stated that the United States should furnish "standard items," that is, identical items to those in the Army's inventory. Such items exist in either the Army's relatively small number of reference laboratories or in the 143 secondary transfer laboratories which utilize standardized calibration sets that apparently are intended as field equipment and are required to be more mobile than

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secondary reference sets. In this connection, standardized requirements for secondary transfer sets derive from a 1978 multi-year procurement that did not require particular brands of components. In reviewing the Army's decision to standardize future procurements of secondary transfer sets, our Office held that the decision was a proper means to avoid the burden and expense of maintaining additional spare parts, multiple maintenance and repair manuals, and having to conduct additional training. Julie Research Laboratories, Inc., B-199416, June 16, 1981, 81-1 C.P.D. ¶ 493.

In further regard to Egypt's first request, where standard components in the Army's inventory were no longer commercially available, or where accessory items were needed, the Army itself specified certain brand name items. The procurement regulations then in effect (Defense Acquisition Regulation, § 6-1307(a), 32 C.F.R. § 6-1307(a) (1982)), however, provided that purchases for FMS customers must be implemented under normal acquisition procedures, including the requirement for competition unless the customer designates a particular source. The Army determined that it had failed to seek competition for these components, and canceled the solicitation.

After the cancellation, Egypt provided the precise specifications used by the Army in the current solicitation. JRL suggests that the Army itself composed these specifications and that Egypt simply adopted them.

The procurement regulations that govern an FMS procurement provide, in part, that a contracting officer "shall honor requests for sole source prime and subcontracts from the FMS customer." Department of Defense Federal Acquisition Regulation (DOD FAR) Supplement, § 25.7307(a), 48 C.F.R. § 225.7307(a) (1984)). This instruction, not the federal statutes and regulations generally pertaining to procurements by or for federal agencies using United States appropriated funds, governs this case since the United States administers the FMS customer's funds as a trustee for the customer. Allied Repair Service, Inc., 62 Comp. Gen. 100 (1982), 82-2 C.P.D. ¶ 541; Julie Research Laboratories, Inc., B-216312, Nov. 30, 1984, 84-2 C.P.D. ¶ 613.

While the United States sometimes loans the FMS customer funds for the sale, that does not change the nature of the United States' role as essentially the FMS customer's agent in the procurement and a trustee of its funds; federal procurement laws and regulations therefore are not applicable to FMS procurements except to the extent they specifically provide so. See Procurements Involving Foreign Military Sales, 58 Comp. Gen. 81 (1978), 78-2 C.P.D. ¶ 349. Although the DOD FAR Supplement, § 25.7307(a), states that the FAR, including its general requirement for competition, applies to FMS procurements, it provides a specific exception where the FMS customer requests a sole source.

Thus, Egypt's second request had legal consequences different from those of its first: while the Army was required to maximize competition before Egypt requested a sole source, that requirement ceased to apply when Egypt designated specific sources.

Concerning JRL's allegation that the Army coached Egypt as to what items to request, which we note the Army denies, we are unaware of any legal impediment to the Army's advising an FMS customer as to what items might best satisfy its needs, and therefore we find it immaterial whether or not the current specifications initially were devised by the Army and recommended to Egypt.

Our view on this last matter might differ if it were shown that the Army sought to have Egypt request certain sources, concerning which Egypt was otherwise indifferent, for the sole purpose of circumventing the requirement for competition. Aside from speculation, however, JRL has presented no evidence to show such was the case. Contracting officials are presumed to act in good faith, and a party attempting to show otherwise must present well-nigh irrefutable proof that they had a specific and malicious intent to harm the party. See Kalvar Corp, Inc. v. United States, 543 F.2d 1298 (Ct. Cl. 1976), cited in Arlandria Construction Co., Inc. - Reconsideration, B-195044; B-195510, July 9, 1980, 80-2 C.P.D. ¶ 21. In this respect, JRL emphasizes that the Army has admitted that some of its technical personnel involved in preparing the specifications for the canceled solicitation had misrepresented certain items as being standard when they were not. That fact, however, does not show that the Army has acted improperly regarding the current solicitation. In addition, JRL argues that the Army's report responding

to the protest contains a basic inconsistency in that it portrays Egypt's selection of components as reasonable based upon the savings of utilizing spare parts and training materials already in the Army's inventory, while at the same time admitting that certain components are not standard. We agree that there is an inconsistency, but we see no basis to view it as rising to the level of nearly irrefutable proof that Army officials acted with the intention to harm JRL.

JRL also argues that the Army failed to comply with a Department of Defense (DOD) manual which states that an FMS customer is required to justify a sole-source request, and that such a request will not be honored in any case of patently arbitrary, capricious or discriminatory exclusion of other sources. 1/

The manual, by its own terms, is an internal instructional manual for DOD personnel, and therefore sets forth executive branch policy that lacks the force and effect of law. See Timeplex, Inc., et al., B-197346 et al., Apr. 13, 1981, 81-1 C.P.D. ¶ 280. In any event, the Army evidently determined that Egypt's request for specific brand name components was not patently arbitrary. It is not our function to determine whether Egypt's request satisfied the Army's manual and, on that basis, to judge the legality of the resultant award.

The protest is denied.

Harry R. Van Cleave
for Comptroller General
of the United States

1/ DOD Manual 5105.38-M, "Security Assistance Management Manual," Ch. 8, § II, B.1 (1984).